Court of Appeals, State of Michigan

ORDER

Sophie Riley v William E. Huey, III

Docket No. 273141

LC No. 93-363491-DP

Alton T. Davis
Presiding Judge

Bill Schuette

Stephen L. Borrello
Judges

On the Court's own motion, the opinion entered in this case on August 21, 2007, is VACATED. The Court orders, pursuant to the terms of the stipulation filed by the parties under MCR 7.218(B), that this appeal is dismissed with prejudice and without costs.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 23 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

SOPHIE RILEY,

Plaintiff-Appellant,

v

WILLIAM E. HUEY III,

Defendant-Appellee.

UNPUBLISHED
August 21, 2007

No. 273141
Wayne Circuit Court
LC No. 93-363491-DP

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order denying plaintiff's motion to enforce the order of filiation and changing custody of the minor child to defendant. We affirm.

The child in this case, Shoshone, was born in 1992. An order of filiation was entered a year later, adjudging defendant to be the father, awarding plaintiff custody, and ordering defendant to pay child support. In December 2005, plaintiff went to the hospital because of a mental breakdown allegedly caused by stress and sleep deprivation, and plaintiff asked defendant to care for Shoshone while she was there. Plaintiff was in the hospital for two weeks, but she returned at the end of January 2006, and remained for approximately a month. Defendant then refused to return Shoshone. Plaintiff filed a motion to enforce the order of filiation. Defendant replied that plaintiff's refusal to take her medication for paranoid schizophrenia endangered Shoshone's safety and welfare. Plaintiff asserted that defendant was violent and also posed a danger to Shoshone. The trial court spoke with Shoshone and expressed concern over plaintiff taking her medication, plaintiff's religious practices, and plaintiff's irrational behavior. The matter ultimately went to a bench trial, where the trial court determined that plaintiff's hospitalizations constituted a change in circumstances, that there had been an established custodial environment with plaintiff, and that there was clear and convincing evidence under the statutory best interest factors that it was in Shoshone's best interest to change custody permanently to defendant.

Plaintiff first argues on appeal, as she did below, that defendant failed to file a motion for change of custody. However, the trial court explained that defendant had orally requested a change in custody at the first hearing. Plaintiff also argues that the trial court failed to consider relevant information and conduct a meaningful examination of all the best interest factors, that the trial court improperly failed to explore defendant's testimony that he would return Shoshone, and that the trial court improperly admitted into evidence the Friend of the Court written report

and recommendation. We agree with the last assertion, but because we find the error harmless, we affirm.

"[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). The great weight of the evidence standard applies to all findings of fact, such as the court's findings of each factor. *Fletcher v Fletcher*, 447 Mich 871, 876-879; 526 NW2d 889 (1994). Discretionary rulings, such as to whom custody is granted, are reviewed for an abuse of discretion. *Id*., pp 879-880. Finally, questions of law are reviewed for clear legal error. *Id*., p 881.

In a child custody dispute, a trial court may modify its previous orders "for proper cause shown or because of change of circumstances." MCL 722.27(1)(c). "[I]f the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "[T]to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*., p 513 (emphasis in original). There must be something more than normal life changes, and the court can look to the statutory best interest factors for guidance. MCL 722.23; *Id*., pp 513-514. Here, the trial court found that plaintiff's mental breakdown in December 2005, leading to an extended period of hospitalization and raising serious concerns about plaintiff taking her medicine, potentially relapsing, and being able to care for Shoshone while ill, constituted a change in circumstances. We agree with the trial court's finding that plaintiff's hospitalizations constituted a condition that could have a significant effect on Shoshone's well-being, so a change in circumstances was properly established.

Next, the court must determine whether there is an established custodial environment. *Vodvarka*, *supra*, p 509. This finding is necessary to "determine the appropriate burden of proof to place on the party seeking the change." *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The trial court concluded that there was an established custodial environment with plaintiff because plaintiff was the primary custodial parent from Shoshone's birth on September 1, 1992, to December 2005. Therefore, defendant was required to present clear and convincing evidence that it was in Shoshone's best interest to change custody to defendant. *Id*., p 6. The best interest of the child are determined by considering the factors enumerated in MCL 722.23. *MacIntyre v McIntyre* (*On Remand*), 267 Mich App 449, 451-452; 705 NW2d 144 (2005). The court explained its findings with respect to best interest factors (a) through (l). There is no indication on the record to support plaintiff's allegation that the trial court refused to consider the evidence she put forth. "The court is not required to comment on every piece of evidence." *LaFleche v Ybarra*, 242 Mich App 692, 702; 619 NW2d 738 (2000) (citation omitted).

MCL 722.23(a) instructs the trial court to consider "[t]he love, affection, and other emotional ties existing between the parties involved and the child." The trial court found that Shoshone loves both parents and both parents love her. However, the relationship between Shoshone and plaintiff was very strained, beyond normal teenage attempts to establish independence. There was an incident where plaintiff took Shoshone from defendant's residence to the airport with two one-way tickets to California, Shoshone informed a security guard that

her mother was taking her to California against her will, and the police held Shoshone until defendant picked her up. After speaking with Shoshone, the trial judge told plaintiff there was some concern over plaintiff not taking her medication. Plaintiff had put Shoshone in Havenwyck Hospital, a psychiatric hospital, for being disobedient, and Shoshone was diagnosed with bipolar disorder. The court properly concluded that this factor favors defendant.

MCL 722.23(b) instructs the trial court to consider "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." The trial court expressed concern about the religious differences between plaintiff and defendant and Shoshone's mixed feelings about this. The evidence supports a finding that Shoshone had mixed feelings about her parents' different religious practices, and the trial judge stated that she learned a lot from talking with Shoshone about plaintiff's religious practices and irrational behavior. The trial court properly found this factor equal for both parties.

MCL 722.23(c) instructs the trial court to consider "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." The court concluded that historically plaintiff had the responsibility to provide for Shoshone, but she left her job because of stress and not been able to find satisfactory employment, whereas defendant had a steady job and stepped in to care for Shoshone without hesitation. The evidence supported these findings, as well as the finding that this factor was equal for both parties.

MCL 722.23(d) instructs the trial court to consider "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The court found that Shoshone lived in the same apartment with plaintiff for several years. However, since plaintiff's breakdown, life had been chaotic for plaintiff and Shoshone. In the past two and a half years, the greatest stability for Shoshone had been at defendant's home, so this factor favored defendant. Shoshone's living conditions at defendant's home were stable, and he never disputed how plaintiff raised her until plaintiff's breakdown in December 2005. Plaintiff was evicted from their apartment for not paying the rent during her sickness. Plaintiff alleged that the breakdown occurred because she was given increased responsibility at work and her sister had died of cancer in 2004. The trial court properly found this factor to favor defendant.

MCL 722.23(e) instructs the trial court to consider "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." This factor was equal because both parties would provide a permanent family unit. Defendant was planning to purchase a house with his girlfriend and felt he could provide a more stable and safe environment for Shoshone than plaintiff. Shoshone got along well with defendant's girlfriend's 16-year-old daughter.

MCL 722.23(f) instructs the trial court to consider "[t]he moral fitness of the parties involved." The court found that, although plaintiff described defendant as immoral for living with his girlfriend without being married, he was never convicted of a crime, never filed bankruptcy or was charged with fraud, does not use drugs or abuse alcohol, and takes care of his parents and daughter. The trial court found the parties equally morally fit. There was evidence that defendant has had no criminal record, takes care of his parents, and has had no problem with his mental or physical health.

MCL 722.23(g) instructs the trial court to consider "[t]he mental and physical health of the parties involved." The trial court found that both parties had good physical health, but plaintiff's mental health condition could affect Shoshone's ability to rely on plaintiff if plaintiff was noncompliant or the medication needed adjustment. The evidence shows that plaintiff was diagnosed with schizophrenia in 1996, had her breakdown in December 2005, and then returned to the hospital on an involuntary basis in February 2006. She went to a hotel to spend a night by herself, had stopped taking her medication, and was very delusional. In the morning, plaintiff felt like her daughter was missing, so she began knocking on all the hotel doors. The manager called the police, and plaintiff ended up back at the hospital. Schizophrenia could be controlled but not cured. The trial court properly found this factor to favor defendant.

MCL 722.23(h) instructs the trial court to consider "[t]he home, school, and community record of the child." The trial court properly found that, as both parties asserted, Shoshone performed very well in school while living with each parent, so this factor was equal.

MCL 722.23(i) instructs the trial court to consider "[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." The trial court indicated that Shoshone expressed an opinion, and it was considered by the court in the decision.

MCL 722.23(j) instructs the trial court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." Both parties affirmed the importance of encouraging a relationship between Shoshone and the other parent, so the trial court properly found this factor equal.

MCL 722.23(k) instructs the trial court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." The trial court indicated that plaintiff insisted that defendant pushed her on one occasion, and defendant adamantly denied an act of violence. The court decided not to consider this factor and left it to the jury on the misdemeanor charge.

MCL 722.23(l) instructs the trial court to consider "[a]ny other factor considered by the court to be relevant to a particular child custody dispute." The court found the family counseling report helpful and noted the therapist's concern with Shoshone's strong reactions. Only one month after being returned to plaintiff, Shoshone began showing truancy and defiant behavior. There was a lot of tension between plaintiff and Shoshone, and the stress of raising a teenage daughter could pose potential problems for plaintiff's emotional well-being if her schizophrenia was not managed successfully. There was evidence in the record to support the court's concerns that the tension between Shoshone and plaintiff could pose a problem in maintaining the emotional well-being of both Shoshone and plaintiff. Plaintiff herself claimed that her mental breakdown was brought on by stress and sleep deprivation. A tense relationship with her daughter could serve as an additional source of stress that could potentially cause another mental breakdown.

We find nothing in the record to show that the trial court's findings were against the great weight of the evidence, nor do we find anything showing that the trial court's conclusion that it

was clearly and convincingly in Shoshone's best interest to have custody changed to defendant was an abuse of discretion.

Plaintiff's assertion that the trial court interfered when it failed to explore defendant's testimony that he would return Shoshone to plaintiff is without merit. The context of defendant's statement supports his assertion that it was nothing more than an outburst of frustration at dealing with plaintiff. The comments in question occurred at the hearing regarding defendant's failure to attend family counseling and mediation. By the time of this hearing, plaintiff had pressed charges against defendant for allegedly pushing her. Defendant asserted that plaintiff had disrupted his and his family members' lives, and he could not deal with her anymore. Defendant's mother pulled out of the supervised visitations, so defendant had to move them to his sister's house, who also did not want to participate based on plaintiff's behavior. Defendant alleged that plaintiff consistently made threatening phone calls to his house. Finally, defendant contended that his job and relationship were in jeopardy because of plaintiff and the proceedings. After plaintiff interrupted defendant several times, despite the trial court's warnings to stop interrupting and the trial court's observation at a prior hearing that plaintiff tended to talk beyond the topic at issue, defendant exclaimed:

> Your Honor, I can't deal with this. I can't. She can take her daughter and I can just go on with my life and see my daughter when I see her and provide for her the way I've been providing for her. I can't have this woman just continue to disrupt my life, I can't. I cannot deal with this, I cannot deal with this anymore. I refuse to.

The court responded, "You have an obligation to your daughter to deal with it." The transcript clearly supports defendant's characterization of his statement, and the trial court properly continued with the proceedings rather than dropping the entire case because defendant was frustrated.

Finally, plaintiff contends that the trial court erred in admitting the family mediation and counseling report into evidence. The Friend of the Court (FOC) prepares a written report and recommendation prior to adjudication of a custody dispute based on an investigation of the relevant facts. MCL 552.505(g); *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989). However, the FOC report is only admissible as evidence if the parties stipulate to its admission. *Id.*, p 79. The parties did not so stipulate, and plaintiff objected to its admission. The trial judge stated that the report was admissible under Michigan Rule of Evidence (MRE) 1101 and would be admitted into evidence regardless of plaintiff's objections to the substance of the report. However, MRE 1101 only states that the rules of evidence are not applicable to the court's *consideration* of the FOC's report or recommendation; it does not affect the admission of the report itself. The trial court erred in admitting the report on the basis of MRE 1101.

Nevertheless, even if it is not admitted into evidence, the trial judge may use the report to assist it in its understanding of the issues as long as the resolution of those issues is based on competent evidence presented at the hearing. *Jacobs v Jacobs*, 118 Mich App 16, 23; 324 NW2d 519 (1982). On the basis of the competent evidence in the record to support the trial court's decision, we find the trial court's error harmless. Although the trial judge referred to the FOC report in the opinion, she did not rely solely on the report as the basis for the decision. Moreover, the trial court indicated that it would address plaintiff's specific objections to the

substantive matters contained within the report as they came up throughout trial. We have concluded, *supra*, that the best interest factors were supported by competent evidence of record. The references in the opinion to the FOC report were merely supplemental. It is not error to make independent findings of fact and conclusions of law that merely coincide with the FOC recommendation. *Bickham v Bickham*, 113 Mich App 408, 411-412; 317 NW2d 642 (1982). Therefore, the error in the admission of the report was harmless, and the trial court's modification of the custody order was proper.

Affirmed.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello